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No. 79-802

In the Supreme Court of the United States

OCTOBER TERM, 1979

LAURENCE ARTHUR JANELLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported. The affirmance is noted at 601 F. 2d 604 (table).

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1979. A petition for rehearing was denied on October 12, 1979. The petition for a writ of certiorari was filed on November 12, 1979 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the inspection by an airline employee of a package deposited for shipment to petitioner violated the Fourth Amendment.

STATEMENT

Following a jury-waived trial on stipulated facts in the United States District Court for the Southern District of California, petitioner was convicted of conspiring to possess and of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 846 and 841(a)(1). Petitioner was sentenced to concurrent terms of imprisonment of one year and one day, to be followed by a special parole term of five years pursuant to 21 U.S.C. 841(b)(1)(A). The court of appeals affirmed (Pet. App. A).

The evidence adduced at the pretrial suppression hearing established that on October 27, 1977, an individual identifying himself as Tim Spencer presented a package to a Western Airlines freight agent in Miami, Florida, for delivery via a flight later that day to petitioner in San Diego, California (Tr. 5, 13).[1] Spencer appeared nervous and, when asked his name, hesitated as if he had to think about it for a second or two before responding. The agent accepted the package, and Spencer left the air freight office (Tr. 5, 8). Spencer's behavior aroused the suspicions of the freight agent, who took the package to his supervisor, Terry Wood, and stated that Spencer fit the "profile" of a bomber (Tr. 6).[2]

[1]"Tr." refers to the reporter's transcript.

[2]Ninety-seven percent of Western's shipping business is derived from commercial shippers. Spencer was an unknown individual shipper who appeared nervous, hesitated when asked his name, and paid cash for the shipment (Tr. 6-7). According to a "profile"

Wood searched the telephone directory to determine whether the return address of the shipper was listed, but he could not find a listing (Tr. 8-9). In addition, Wood knew that a Frontier aircraft had been hijacked a week earlier and that Western airlines had received a bomb threat within the previous two days (Tr. 7-8). He decided to open the package because he feared it might contain a bomb or "something that could be damaging to the airplane" (Tr. 9, 12). Upon discovering two clear plastic bags containing white powder in the package, Wood contacted the local police, who determined that the substance was cocaine (C.T. 36).[3] The package was resealed and shipped to Western Airlines' San Diego Air Freight office (C.T. 36). Petitioner was arrested when he picked up the package (C.T. 36-37).

ARGUMENT

As petitioner apparently concedes, the Fourth Amendment applies only to governmental searches and seizures, not to a search by a private party who voluntarily turns over the evidence he has discovered to government agents. See, *e.g.*, *Burdeau* v. *McDowell*, 256 U.S. 465, 475-476 (1921); *United States* v. *Lamar*, 545 F. 2d 488, 490 (5th Cir.), cert. denied, 430 U.S. 959 (1977); *United States* v. *Crabtree*, 545 F. 2d 884, 885-886 (4th Cir. 1976); *United States* v. *Sherwin*, 539 F. 2d 1, 5-7 (9th Cir. 1976) (en banc); *United States* v. *Capra*, 501 F. 2d 267, 272-273 n.4 (2d Cir. 1974). The record clearly establishes that the airline's search of the package was

developed by Western Airlines, such "walk-on" freight brought by persons exhibiting Spencer's suspicious behavior is more likely to contain an explosive device than freight from commerical sources (Tr. 7, 10).

[3]"C.T." refers to the clerk's transcript of the record on appeal.

not undertaken to serve a law enforcement purpose and was neither based upon information received from law enforcement personnel nor done at their behest. Instead, the airline undertook the search on its own initiative to protect the safety of its passengers because of a well founded concern that the package may have contained an explosive device. The search was thus a private search that did not implicate the Fourth Amendment. See *United States* v. *Ford*, 525 F. 2d 1308, 1311-1312 (10th Cir. 1975); *United States* v. *Pryba*, 502 F. 2d 391 397-401 (D.C. Cir. 1974), cert. denied, 419 U.S. 1127 (1975); *United States* v. *DeBerry*, 487 F. 2d 448, 449-451 (2d Cir. 1973).[4]

Petitioner contends (Pet. 9-10), however, that the package was inspected pursuant to security regulations promulgated by the Federal Aviation Administration, that the government therefore participated in a significant manner in the inspection, and that the inspection accordingly must comply with Fourth Amendment requirements.

The FAA regulation on which petitioner relies is 14 C.F.R. 121.538(c),[5] which requires certain airlines to submit for approval by the FAA a security program that

[4]Suppression of the fruits of a private search, especially in the context of air freight suspected to contain explosives, would not advance the deterrent purposes of the exclusionary rule, since there is little likelihood that an airline would forego immediate inspection of possibly dangerous cargo because of a fear that a potential criminal prosecution would not go forward. See generally *United States* v. *Janis*, 428 U.S. 433, 456, n.31 (1976).

[5]Petitioner also appears to rely (see Pet. 9-10) on 49 U.S.C. 1511, which requires carriers to refuse passage to persons who do not consent to a search to determine if they are carrying dangerous weapons. But, as the court concluded in *United States* v. *Gumerlock*, 590 F. 2d 794, 797-799 (9th Cir.) (en banc), cert. denied, No. 78-6300 (May 14, 1979), nothing in the legislative history of the statute or in the FAA's subsequent regulations suggests that the statute was meant to require the screening of air freight.

shows the procedures and facilities that the airline intends to use to support that program. The airline's procedures must meet certain requirements, including being "designed to * * * [p]revent cargo and checked baggage from being loaded aboard its aircraft unless handled in accordance with the certificate holder's security procedures." 14 C.F.R. 121.538(c)(3).[6]

Petitioner did not establish at the suppression hearing that Western Airlines has an FAA-approved security program setting forth procedures for inspection of air freight (Pet. App. 3-4).[7] He nonetheless argues that if such a program exists, the inspection was a governmental search that must meet Fourth Amendment standards. This Court need not consider that highly speculative question.[8] In any event, even assuming *arguendo* that there is such an approved program, petitioner's claim that his Fourth Amendment rights were violated by the search involved here is without merit.

[6]This regulation was promulgated pursuant to the FAA's general authority to prescribe safety regulations for aviation (see 37 Fed. Reg. 4904-4905 (1972)) and not, as petitioner suggests (Pet. 9-10), under the anti-hijacking provisions later enacted as the Air Transportation Security Act of 1974, 49 U.S.C. 1356 *et seq.*

[7]Although revealing details of any security program would have seriously jeopardized important safety interests, petitioner presumably could have established, through *in camera* inspection of Western's security procedures, whether the airline had an approved security program and whether that program required inspection of the parcel in this case. Petitioner showed only that the Western Airlines "profile" was established in accordance with FAA regulations (Tr. 10, 11). He did not establish that the FAA had approved a program for the inspection of air freight.

[8]Nor is petitioner now entitled to the remand he seeks (Pet. 11-14) to permit the district court to determine whether Western Airlines has an approved cargo security program. Cf. *Rakas* v. *Illinois*, 439 U.S. 128, 130-131 n.1 (1978).

Relying on its en banc decision in *United States* v. *Gumerlock*, 590 F. 2d 794, 799 (9th Cir. 1979), cert. denied, No. 78-6300 (May 14, 1979), the court of appeals correctly held (Pet. App. 3) that 14 C.F.R. 121.538 (c) "does not require carriers to adopt any particular security procedures with respect to cargo; specifically, it does not require inspection of cargo." The regulation merely leaves to the airline the choice of security procedures, and requires the carrier to comply with whatever procedures it selects. Thus, if Western Airlines' security procedure for cargo did require these inspections, that requirement was not the result of any federal direction.[9] Agency approval of a security plan is not itself enough to render subsequent inspections by airline employees, made pursuant to the plan, subject to the Fourth Amendment. Cf. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974) (approval of tariff by state utility commission where tariff was not ordered by state commission was not state action for purposes of Fourteenth Amendment).[10]

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[9]Since the screening procedures for boarding passengers and carry-on luggage are required by agency directives authorized by 49 U.S.C. 1356, petitioner's claim (Pet. 10-11) that this case is inconsistent with *United States* v. *Davis*, 482 F. 2d 893, 896-904 (9th Cir. 1973), is without merit. In any event, any intracircuit conflict does not require resolution by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

[10]Because petitioner's limited contention is that the Fourth Amendment is applicable here only by virtue of federal regulations relating to airport security measures, it is not necessary to defer disposition of this petition pending this Court's decision in *Walter* v. *United States*, No. 79-67, and *Sanders* v. *United States*, cert. granted, No. 79-148 (Oct. 15, 1979). *Walter* and *Sanders* presented the entirely different question whether the Fourth Amendment requires suppression of allegedly obscene materials consensually transferred to the government by a private party to whom the materials had been inadvertently misdelivered.

Finally, even if the search were subject to the Fourth Amendment, the result in this case would be no different. The evidence obtained by the inspection would still be admissible because petitioner had no legitimate expectation of privacy in the air cargo. See *Katz* v. *United States*, 389 U.S. 347, 351 (1967). Under applicable tariffs, all air freight shipments are subject to inspection by the carrier. See *United States* v. *Gumerlock*, *supra*, 590 F. 2d at 799 n.17. Moreover, the common law recognizes a carrier's right to inspect the articles it is carrying, if suspicion about their contents is aroused. See *United States* v. *Rodriguez*, 596 F. 2d 169, 173 (6th Cir. 1979); *United States* v. *Pryba*, *supra*, 502 F. 2d at 399. In light of this established history, any expectation that petitioner might have had that the package would not be inspected simply ignored the realities of air cargo practices.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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